Supreme Court, U.S.
FILED

97 • 557 SEP 29 1997

No.

OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

CHRISTOPHER PANGALOS,

Petitioner,

vs.

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

LARRY PITT
Counsel of Record
DONNA E. BAKER
GEORGE D. WALKER, JR.
MARK S. SCHEFFER
LARRY PITT & ASSOCIATES, P.C.
Attorneys for Petitioner
1918 Pine Street
Philadelphia, Pennsylvania 19103
(215) 546-0011

72028 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

33 pp

QUESTION PRESENTED FOR REVIEW

Whether under the Americans With Disabilities Act the burden of proof falls on the employee or on the employer regarding the issue of reasonable accommodation, and specifically, whether the burden of proof on whether there is another position within the employer's work force which would reasonably accommodate the employee's disability falls on the employer or the employee.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties to the Proceedings in the Court Below	ii
Table of Contents	iii
Table of Citations	iii
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions, Statutes, Rules and Regulations Involved	1
Statement of the Case	3
Reasons for Granting the Writ	8
Conclusion	15

TABLE OF CITATIONS

Cases Cited:

Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130 (7th Cir. 1996) 11, 12

Borkowski v. Valley Central School District, 63 F.3d 131 (2nd Cir. 1995) 10, 11

Contents

Page

Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996) 12, 13

Gilbert v. Frank, 949 F.2d 637 (2nd Cir. 1991) 11, 13

Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) ... 11

Mengine v. Runyon, 114 F.3d 415 (3rd Cir. 1997) 12

Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. Unit A 1981) 11

Soileau v. Guilford of Maine, Inc., 105 F.3d 12 (1st Cir. 1997) 10

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) . 13

Stone v. City of Mount Vernon, 118 F.3d 92 (2nd Cir. 1997) 10, 11

Willis v. Conopco, Inc., 108 F.3d 282 (11th Cir. 1997) ... 11

Statutes Cited:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 12101, *et seq.* 1, 3

42 U.S.C. § 12111(9)(B) 2, 9

42 U.S.C. § 12112 (a), (b), (5)(A) 2

Contents

	Page
42 U.S.C. § 12112(a)	9
42 U.S.C. § 12112(b)(5)(A)	9
Other Authorities Cited:	
29 C.F.R. § 1630.2(o)	3
29 C.F.R. § 1630.2(o)(2)(ii)	9
Philadelphia Inquirer	5, 6

APPENDIX

Appendix A — Judgment Order Of The United States Court Of Appeals For The Third Circuit Dated June 30, 1997	1a
Appendix B — Memorandum And Order Of the United States District Court For The Eastern District Of Pennsylvania Entered October 16, 1996	3a
Appendix C — Denial Of Petition For Rehearing Of The United States Court Of Appeals For The Third Circuit Dated July 29, 1997	11a

OPINIONS BELOW

The June 30, 1997 Opinion of the Court of Appeals, whose judgment is sought herein to be reviewed is reprinted in the separate Appendix to this Petition at p. 1a. The separate Opinion of the Court of Appeals Sur Petition Rehearing dated July 29, 1997 is reprinted in the Appendix at p. 11a. The prior Opinion of the United States District Court for the Eastern District of Pennsylvania entered on October 16, 1996 at Civil Action No. 96-0167 is reprinted in the separate Appendix of this Petition at p. 3a.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on June 30, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

This case involves the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA"). Specifically, the following statutory provisions of the ADA are involved: "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment . . ." as used in subsection (a) of this section, the term "discriminate" includes — (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the

operation of the business of such covered entity. 42 U.S.C. § 12112 (a), (b), (5)(A).

"The term 'reasonable accommodation' may include . . . job restructuring, part time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 U.S.C. § 12111(9)(B).

Reassignment to a vacant position is also listed as a potential reasonable accommodation. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship.

An employer should reassign the individual to an equivalent position, in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A "reasonable amount of time" should be determined in light of the circumstances. If, for example, a position is to open in the near future, the employer may have a duty to assign the disabled employee to that position, even though no current opening may be available.

An employer may reassign an individual to a lower graded position if there are no accommodations which would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified, with or without reasonable accommodation.

The determination of which accommodation is appropriate in a particular situation involves a process in which the employer and employee identify the precise limitations imposed by the

disability and explore potential accommodations that would overcome those limitations. This process is discussed more fully in § 1630.9 Not Making Reasonable Accommodation. 29 C.F.R. Part 1630, § 1630.2(o).

STATEMENT OF THE CASE

This action is brought by petitioner, Christopher Pangalos, under the employment provisions of the Americans With Disabilities Act, 42 U.S.C. § 12101, *et seq*. Mr. Pangalos began employment as a sales and service representative for Prudential Insurance Company of America, respondent, in 1984. Some seven years after commencing employment, Mr. Pangalos developed a disability, ulcerative colitis. Mr. Pangalos began in 1993 to seek reasonable accommodation for his disability.

The record demonstrates that in the summer of 1993 Mr. Pangalos informed his general manager and immediate supervisor, Ari Horowitz, that he had a problem controlling his bowels which consisted of diarrhea and rectal bleeding. Mr. Horowitz's advice to petitioner was to "wear diapers." Mr. Pangalos told Mr. Horowitz that because of his medical condition he did not believe he would be able to go to clients' homes. Mr. Horowitz informed petitioner that he expected petitioner to do his job as he always had done it and that if petitioner was unable to perform all aspects of his job, he should consult Prudential's Disability Unit. Mr. Horowitz took no action of any sort in order to determine whether or not any accommodation would be made for Mr. Pangalos.

Subsequently, petitioner had conversations with Donald Carter, a disability coordinator with respondent, regarding petitioner's need to have access to a bathroom. Mr. Carter informed petitioner that he should quit his job with respondent because respondent would not provide petitioner with

accommodations. Mr. Pangalos, in his discussions with Mr. Carter, advised that, in petitioner's opinion, he would be able to perform his job as a sales agent if he had accommodation. Accommodations suggested by petitioner included revising petitioner's schedule, reassignment to a new position, and being provided with a mobile bathroom with sanitary facilities. Mr. Carter told petitioner that respondent does not make accommodations.

Responding to Mr. Pangalos' repeated requests for placement at another position within Prudential, Mr. Carter, in April 1994, informed petitioner that he was no longer to call him and that it would be Mr. Carter who would call petitioner if and when Mr. Carter located a job for petitioner within Prudential. Petitioner asked Mr. Carter about the existence of job openings and Mr. Carter stated that he would take care of looking into job openings. Mr. Pangalos trusted Mr. Carter to do this. Upon Mr. Carter's request, in April 1994, petitioner sent his resume to Mr. Carter. Mr. Carter had told petitioner that placement at the home office was a possibility. On May 18, 1994 Mr. Carter addressed a letter to petitioner which advised petitioner to inform Prudential if petitioner was in need of accommodation. Petitioner immediately called Mr. Carter and wanted to know why Mr. Carter had sent him that letter since Mr. Carter already knew that petitioner had been requesting an accommodation.

During a subsequent telephone conversation, Mr. Carter again told Mr. Pangalos that Prudential does not provide accommodations. Petitioner advised Mr. Carter that, in his opinion, he was not totally disabled, but that he did have a disability. Petitioner wanted the chance to go to work and to go back to do a job within Prudential other than his sales agent job, or to be given an accommodation so that he could perform his sales agent job.

In May, 1994, Eve Young, an employee of respondent in its Equal Employment Opportunity Unit, examined petitioner's case and after discussing it with a company doctor, determined that petitioner would not be able to perform the essential functions of his regular job duties at that time. Ms. Young was advised by a co-employee of the Equal Employment Opportunity Unit that among Prudential's obligations to provide reasonable accommodation to petitioner was to help him to perform the essential functions of his current position, or, if that was not possible, provide a transfer to a position at the same responsibility and pay, or a transfer to a lower paying position. After receiving this memo, Ms. Young took no further action on behalf of attempting to accommodate Mr. Pangalos until January 1995.

During the months of October 1993, November 1993, February 1994, and January 1995, respondent placed help wanted advertisements for job openings at various locations in the Philadelphia area. These jobs were to be performed in an office setting and were to provide training for qualified applicants. None of these jobs which respondent advertised in the want ads of the *Philadelphia Inquirer* were offered to petitioner. The job positions advertised on February 20, 1994 included the following, "Customer Service: Member Service Representatives – working in our Customer Service Phone Unit. Member Service Representatives respond to Pru-Care members regarding coverage and reimbursement. Previous telephone/ customer service experience a plus." Petitioner's position title with Prudential was Insurance and Financial Services Sales Representative.

The advertisements appearing on January 22, 1995 and February 19, 1995 included the following: "Insurance and Financial Services – Industry renowned training. Advancement Opportunity. Strong marketing support. High earnings potential.

Aggressive expansion program. For more info., call M. Reynolds, 609-882-3500. EOE. The Prudential."

Evidence of record demonstrates that petitioner was qualified for these job openings. Mr. Pangalos testified to his job skills as follows:

> Q: At this point, Mr. Pangalos, what jobs do you think that you're qualified to perform?
>
> A: In the total world?
>
> Q: Yes.
>
> A: I mean, based upon my skill, I have ten years as an insurance rep. Okay. I've done, you know, phone work. I've done sales. I've done marketing. I mean, I've done filing, okay. I've done numerous, you know, different things, customer service reps. I can do a heck of a lot. I mean, insurance agents are definitely not the low men on the totem poles with insurance companies.
>
> * * *
>
> A: Customer service rep. Okay. I mean, you need some data entry, I mean, I'm not the fastest person in the world, but I can do data entry, and whatever slowness I have on that will pick up, you know, pretty quickly, and I can also do customer service and their policies better than, you know, the people they're hiring now.

On the basis of the record evidence, petitioner demonstrated the existence of vacant positions for which he would have been qualified had he been considered for these positions by respondent.

The record demonstrates that respondent did not make reasonable efforts to assist petitioner, did not act in good faith and impeded petitioner's attempts to obtain a vacant position. Mr. Carter, in May 1994, advised petitioner not to continue to call him concerning the prospect of reassignment, but that it would be Mr. Carter who would contact petitioner should the opportunity for reassignment become available. Mr. Pangalos reasonably relied upon Mr. Carter's representation that he would attempt to locate a vacant position. Respondent took no concrete steps to investigate a possible alternative job position until April 1995, more than fifteen months after the first request for accommodation by petitioner. This inaction by respondent, at a minimum, raised a jury question regarding respondent's good faith and non-impediment of petitioner's attempts to locate a vacant position.

On October 16, 1996 the District Court for the Eastern District of Pennsylvania granted defendant summary judgment on petitioner's ADA claim. On June 30, 1997 a panel of the United States Court of Appeals for the Third Circuit affirmed the District Court Opinion. Petitioner filed a Petition for Rehearing *en banc*, which was denied.

The standing ruling of the lower court in this case was based on several grounds. First, it held that petitioner was not disabled because his condition could "readily be remedied surgically." The Third Circuit disavowed that ground, and it cannot serve as a support for the lower court decision. Second, the lower court found that petitioner was not qualified to perform the essential functions of **his position** with respondent. Petitioner did request

a transfer to another position within his capabilities, and a determination that he could not perform **his position** is not dispositive.

The lower court's other ground for its ruling was the absence of a "feasible accommodation" and the offering of respondent of a "reasonable accommodation" to petitioner to perform his job. On this basis, its holding that respondent is not required to transfer petitioner to another position, and its apparent failure to place the burden of proof on respondent with regard to reasonable accommodation, require reversal of the judgment. Had the lower court recognized that a defendant may have a duty to transfer an employee, and had it placed the burden of proof on respondent, petitioner's evidence of respondent's advertising for various positions during the time in question, coupled with petitioner's qualifications and respondent's failure to consider him, would have presented issues of material fact as to whether there was a feasible accommodation, and precluded judgment as a matter of law for respondent.

REASONS FOR GRANTING THE WRIT

The Circuit Courts are split on the issue of who has the burden of proof on reasonable accommodation. Disabled workers are not receiving the benefits of reasonable accommodation that the ADA was meant to provide. The obligation placed on employers to provide disabled employees a reasonable accommodation requires that they bear the burden of proof on determining whether that obligation has been met. It also requires employers to transfer an employee to a vacant position which is within an employee's physical restrictions, and which would enable him to continue to be a productive member of the work force.

A central issue in this case in whether an employer has the

obligation to transfer an employee to another position within his physical restrictions when the employee's disability prevents him from performing his current position. The District Court, affirmed by the Third Circuit, held that an employer has no such obligation. A corollary to that issue, and one that goes to the core of the reasonable accommodation issue, is which party has the burden of proof in determining whether the employer has fulfilled the ADA's mandate of providing reasonable accommodation. By failing to recognize the employer's responsibilities to consider transfer or reassignment, and by failing to place the burden on the employer in determining whether the employer fulfilled its statutory obligations, the Third Circuit has misconstrued the ADA's mandates.

The ADA proscribes discrimination against a qualified individual with a disability because of the disability. 42 U.S.C. § 12112(a). Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability is discrimination within the meaning of the ADA. 42 U.S.C. § 12112(b)(5)(A). The term reasonable accommodation includes reassignment to a vacant position. 42 U.S.C. § 12111(9)(B), 29 C.F.R. § 1630.2(o)(2)(ii). The lower court's holding that an employer does not have a duty to transfer or reassign, and its failure to place the burden of proof to show reasonable accommodation on the employer, misstates the law and highlights an issue having significant impact for disabled Americans in the work force.

The Supreme Court has never addressed the issue of reasonable accommodation under the ADA. In fact, the Supreme Court has never addressed the mandates of, and obligations imposed upon employers by the ADA. The Circuit Courts are in conflict as to the standards, and burdens, to be placed on litigants in deciding whether an employer's obligation to reasonably accommodate a disabled employee is met.

In *Borkowski v. Valley Central School District*, 63 F.3d 131 (2nd Cir. 1995)[1], the Court noted that:

> Given the rather obscure regulatory language, it is perhaps not surprising that courts have struggled to give content to the terms reasonable accommodation and undue hardship. It is also not surprising, in view of the lack of any direct statutory guidance, that they have found the assignment of the burdens of production and persuasion particularly difficult as to reasonable accommodation.

Id. at 136. The confusion is compounded by the fact that the anti-discrimination obligations of the ADA "are unusual in the context of federal civil rights statutes." *Id.* The ADA "imposes not only a prohibition against discrimination, but also, in appropriate circumstances, a positive obligation to make reasonable accommodation." *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 14 (1st Cir. 1997).

As noted by the Second Circuit in *Borkowski*, the D.C. Circuit places the burden of proof and production on the employee, requiring the employee to show that the accommodation allows her to perform the essential functions of the job in question, and requiring the employee to show that the accommodation is reasonable in terms of the burdens that are placed on employers. *Borkowski*, 63 F.3d at 136 (citations

---

1. *Borkowski*, and many of the cases cited below, address the issue of reasonable accommodation under the Rehabilitation Act. However, the obligation imposed by the ADA and the Rehabilitation Act regarding reasonable accommodation are "equivalent." *Borkowski*, 63 F.3d at 137; *see also Stone v. City of Mount Vernon*, 118 F.3d 92 (2nd Cir. 1997).

omitted). The Eleventh Circuit follows the D.C. Circuit's approach. *See Willis v. Conopco, Inc.*, 108 F.3d 282, at 284-85 (11th Cir. 1997).

The Fifth and Ninth Circuits place the burden of proof on the employer, and under their analysis the employer bears the initial burden of production to present evidence that indicates reasonable accommodation of the employee would not be possible, and places the ultimate burden of persuasion regarding reasonable accommodation on the employer. *See Mantolete v. Bolger*, 767 F.2d 1416, 1423-24 (9th Cir. 1985); *Prewitt v. U.S. Postal Service*, 662 F.2d 292 (5th Cir. Unit A 1981).

The Second Circuit takes what it describes as "a middle course," which places the burden of production on the employee, and the burden of proof on the employer. *Borkowski*, 63 F.3d at 137; *Stone*, 118 F.2d at 98 (ADA case). The Second Circuit places the burden of production on the employee to show that he can perform the job at issue either with or without a reasonable accommodation, and deems the employee to have met this burden when he presents evidence of his individual capabilities and of suggestions for some reasonable assistance or job modification by the employer. *Gilbert v. Frank*, 949 F.2d 637, 642 (2nd Cir. 1991). The burden then shifts to the employer to show that no reasonable accommodation is possible. *Id.*

The Seventh Circuit has taken yet a different approach. In *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130 (7th Cir. 1996), the Court described the duty of the parties to engage in an "interactive process," and noted that:

> No hard and fast rule will suffice, because neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather,

> courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.

Beck, 75 F.3d at 1135. Subsequent to *Beck*, the Seventh Circuit has effectively split the burden of proof by holding that "the burden was on both [employer] and [employee] to engage in the interactive process." *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1286 (7th Cir. 1996).

The Third Circuit has adopted a hybrid approach which incorporates the "interactive process" analysis of *Beck*. Specifically, in the context of a request for reassignment or transfer, the Third Circuit places the burden on the employee to demonstrate that there were vacant funded positions whose essential duties he was capable of performing. *Mengine v. Runyon*, 114 F.3d 415, 419 (3rd Cir. 1997) (Rehab. Act case). The Third Circuit places this burden on the employee despite noting that in many cases "an employee will not have the ability or the resources to identify a vacant position absent participation by the employer." *Id.* at 420. The Third Circuit then adopted the "interactive process" approach of *Beck*, and stated that "if an employer fails to engage in the interactive process, it may not discover a way in which the employee's disability could have been reasonably accommodated, thereby risking violation of the Rehabilitation Act." *Id.* at 420-21.

The ADA and Rehabilitation Acts are unique among federal anti-discrimination statutes in mandating not only a prohibition against discrimination against certain classes, but also a positive obligation that an employer take action, over and beyond that which is required for others, to reasonably accommodate an employee with a disability. The Circuit Courts have recognized this distinction by noting the difference between a typical disparate treatment case under the ADA (*e.g.*, a claim that an individual was fired because of a disability), which would invoke the burden shifting analysis examined by this Court in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and a reasonable accommodation case, which would not be subject to the same burden shifting analysis. *See Bultemeyer*, 100 F.3d at 1283-84.

The split in the Circuit Courts on the burden of proof in a reasonable accommodation case requires guidance from this Court. This case shows why such guidance is necessary. In the situation of a request by a disabled employee for a transfer to another position, the allocation of the burden of proof becomes of critical importance in light of the employer's greater access to information regarding vacant openings within its work force. *Cf. Gilbert*, 949 F.2d at 642 (in light of the goals of the Rehabilitation Act and the greater access of the employer to information regarding the feasibility of various possible job modifications, the employer is given the ultimate burden of proof on the issue of reasonable accommodation). To require the disabled employee to bear the burden of identifying specific available positions in a large corporation with offices throughout the country would effectively eviscerate the employer's obligation to provide reasonable accommodation. The employer could, as in this case, discourage an employee's efforts to seek another position, or bar the employee access to documents which would enable him to identify other positions, and make the reasonable accommodation of a transfer impossible.

In this case, petitioner requested various accommodations, including requests for placement into another position. Petitioner had discussions with Donald Carter, respondent's disability coordinator, about finding another position, and was told that he should not contact Carter, but would be contacted by Carter if and when Carter located a job for petitioner with respondent. Petitioner asked Carter about job openings, and Carter said he would look into them. Upon subsequent contact, after petitioner had not been informed of any openings, Carter flat out told petitioner that Prudential does not provide accommodations.

During the time period petitioner was requesting accommodation, respondent was running ads in the local paper for a variety of positions. Petitioner, who had worked as a sales and service representative for respondent for many years, had transferrable skills which qualified him for these entry level positions. Yet respondent did not consider petitioner for any of these positions. On this record, with the burden of proof on reasonable accommodation properly allocated to respondent, summary judgment should not have been entered.

An employer with a large work force, and a need for employees to fill numerous vacant positions (as evidenced on this record by respondent's advertisements), must be charged with the obligation, in meeting the ADA's mandate of reasonable accommodation, of identifying — and offering — to a disabled employee a position within his restriction. The Third Circuit's failure to charge respondent with that obligation, and to place the burden of proof on respondent, worked an injustice contrary to the mandate, and spirit of the ADA. Furthermore, the confusion and split of the Circuit Courts on the issue of reasonable accommodation, and the duty to identify transfer opportunities or vacant positions within the employee's capabilities, require that this Court clarify the ADA's requirement of reasonable accommodation, and insure that disabled workers

in our nation's work force receive the protection the ADA was intended to afford.

It is respectfully requested that certiorari be granted.

CONCLUSION

Wherefore, petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

LARRY PITT
Counsel of Record
DONNA E. BAKER
GEORGE D. WALKER, JR.
MARK S. SCHEFFER
LARRY PITT & ASSOCIATES, P.C.
Attorneys for Petitioner
1918 Pine Street
Philadelphia, Pennsylvania 19103
(215) 546-0011

APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JUNE 30, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-2022

CHRISTOPHER PANGALOS,

Appellant

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-00167)
District Judge: Honorable John P. Fullam

Argued: June 26, 1997

BEFORE: GREENBERG and MCKEE, *Circuit Judges*,
and GREENAWAY*, *District Judge*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the order of the district

---

* Honorable Joseph A. Greenaway, Jr., Judge of the United States District Court for the District of New Jersey, sitting by designation.

court entered October 16, 1996, be and is hereby affirmed. This court, however, does not agree with the district court's statement in its Memorandum opinion of October 15, 1996, that "plaintiff is not disabled, because the disabling condition he alleges could readily be remedied surgically."

Costs taxed against appellant.

BY THE COURT:

s/ illegible
Circuit Judge

ATTEST:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: JUN 30 1997

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED OCTOBER 16, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-0167

CHRISTOPHER PANGALOS

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA

MEMORANDUM AND ORDER

FULLAM, Sr.J. OCTOBER 15, 1996

Defendant has filed a motion for summary judgment in this action under the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq.

Plaintiff was employed by the defendant as a life-insurance salesman. His territory covered portions of the City of Philadelphia. In 1993, plaintiff was diagnosed as suffering from ulcerative colitis. At that time, his symptoms were particularly severe: Uncontrollable diarrhea, bloody stools, painful hemorrhoids, etc. He therefore took a leave of absence, under Prudential's short-term disability program. In December 1994, his eligibility for short-term disability was about to expire. The medical evidence he submitted at that time showed that he was not eligible for the company's permanent disability program,

but rather was able to return to work. Plaintiff was advised that he would be expected to return to work not later than January 31, 1995, or face the prospect of "out-placement".

Plaintiff appealed the denial of long-term disability benefits, and those benefits continued until his appeal was decided. After his appeal was denied, plaintiff failed to return to work, and was terminated as of May 9, 1995.

Plaintiff asserts that he suffers from a "disability" as defined in the ADA statute; that he is capable of fulfilling all of the functions of the job of insurance salesman, with reasonable accommodations for his disability; and that the defendant failed to make reasonable efforts to accommodate his disability. Plaintiff further asserts that the defendant discriminatorily discharged him because he had complained to the Equal Employment Opportunity Commission about the denial of long-term disability benefits and the alleged failure to accommodate his disability.

According to Plaintiff's evidence, he is subject to attacks of diarrhea which can occur without any advance warning. It is essential that he have ready access to toilet facilities at all times. The condition "flares up" periodically. The longest he has ever gone without an attack of diarrhea has been eight or ten days. He has some degree of control over the situation, in that abstaining from eating solid foods at breakfast and lunchtime makes it less likely that he will have an attack during working hours; but even that solution is not foolproof.

According to plaintiff, the only "cure" for his condition would be to undergo a colostomy (surgical removal of the colon), but he is not willing to consider that drastic alternative.

Appendix B

Plaintiff's job with Prudential necessitated constant travel to the homes of policyholders and prospective policyholders; the job could not be performed from an office.

When plaintiff's short-term disability leave was about to expire, there were discussions between plaintiff and representatives of the defendant concerning the feasibility of accommodating plaintiff's disability. Plaintiff suggested that the defendant might purchase a van or similar vehicle equipped with a bathroom, for plaintiff to use in performing the functions of his job. Plaintiff acknowledged, however, that the cost of such a vehicle would be prohibitive (according to plaintiff, somewhere between $40,000.00 and $100,000.00). The alternative preferred by plaintiff was assignment to a job which did not involve travel.

Under standard company policy, an employee in plaintiff's position could not relocate to another part of the country without prior notice to, and approval by, his superiors. In violation of that policy, plaintiff had moved from Philadelphia to Kentucky, in December, 1994. Among the accommodations discussed with defendant's representatives was plaintiff's suggestion that the defendant establish an office in one of three specified towns in Kentucky, and assign plaintiff to that office. It was plaintiff's belief that, in that part of the country, he could carry out his work with a minimum of travel, because prospective customers would be willing to come to the office to transact business.

The defendant made the following efforts to accommodate plaintiff's problem:

1) An offer to provide a portable toilet which could be installed on a pick-up truck, with a camper body which would also be supplied by defendant, or to provide a portable toilet

which could be installed in a van, if plaintiff would provide the van.

2) A waiver of company rules governing relocations, and arranging to have plaintiff interviewed for various other possible positions with Prudential in the Kentucky area.

3) Fairly extensive efforts to find some other position within the company which plaintiff could fulfill, which would not involve travel.

The defendant refused to purchase and equip a van, because of the cost. The parties were unable to reach an agreement concerning supplying plaintiff with a portable toilet facility. Plaintiff viewed any such accommodation as inadequate unless it included, in addition to a toilet, facilities for washing up. Defendant was willing to provide a portable toilet of the type used by campers, but not a portable bathroom.

The efforts to obtain other employment with Prudential were unavailing and plaintiff was terminated as of May 9, 1995. Plaintiff was offered out-placement services, but did not avail himself of such services.

To qualify as having a "disability" within the meaning of the statute, plaintiff must show that he has a condition which is permanent, or at least of indefinite prospective duration, and that the condition substantially interferes with his ability to perform one or more of his major life activities. On the present record, this is indeed problematic: While sudden onslaughts of diarrhea without advanced warning can plainly be regarded as limiting plaintiff's ability to perform major life functions, the disability could be remedied by surgical treatment. Moreover,

it appears that plaintiff has never seriously considered the possibility that a diaper or other special undergarment might well provide an adequate solution to the difficulty. (In his deposition testimony, plaintiff took the position that a diaper or similar special undergarment would be too uncomfortable because he would be forced to sit in his own excrement, would develop rashes, etc. Plaintiff testified further, however, that he frequently finds it necessary to keep a plastic bag in his automobile, to protect the upholstery; and that his clothing frequently becomes visibly stained and repulsive. The possibility of using a sanitary undergarment as a brief, temporary solution for emergencies does not seem to have been entertained.)

The defendant is not required to modify the actual duties of plaintiff's job in order to accommodate his disability. 29 C.F.R. part 1630, APP. § 1630.2(o); *Myers v. Hose*, 50 Fed. 3d. 278, 284 (4th Cir. 1995). Neither is the defendant required to create a new position for an employee who cannot perform an essential function of his job. *White v. York, International Corp.*, 45 Fed. 3d. 357, 362 (10th Cir. 1995). And the defendant is not required to transfer plaintiff to another position, *Daugherty v. City of El Paso* 56 Fed. 3d. 695, 699 (5th Cir. 1995).

It is undisputed that plaintiff's job as an insurance salesman (or "marketing representative") required him to spend a large proportion of his time "in the field" — i.e., visiting clients and prospective clients at their homes or offices. This means, in turn, that an essential part of plaintiff's job was the ability to refrain from noticeably befouling himself or his customer's premises.

As noted above, plaintiff testified that the only reliable and permanent cure for his condition would be to undergo a colostomy. If plaintiff were to undergo a successful colostomy,

he would no longer be disabled. If plaintiff's refusal to undergo a colostomy represents a reasonable decision on his part, — and that is, of course, a choice which only he is entitled to make — it follows inevitably that plaintiff is not qualified to perform his job, since he would continue to be subject to sudden onslaughts of diarrhea.

The accommodation suggested by plaintiff (a vehicle with a complete bathroom, protected from freezing in cold weather) and the accommodation offered by the defendant (some kind of portable toilet) differ only in degree; under plaintiff's proposal, it would arguably be more convenient for plaintiff to clean himself after an episode. But the two proposals are alike in that they would, at best, provide only a partial solution to the problem. It seems obvious that, in the course of his sales calls, plaintiff would not always have immediate access to either type of portable facility.

My conclusions are as follows:

1) Either plaintiff is not disabled, because the disabling condition he alleges could readily be remedied surgically, or plaintiff is not qualified to perform the essential duties of his position with the defendant.

2) Either there is no feasible accommodation which would enable plaintiff to perform the essential duties of his job, or the accommodation offered by the defendant is, as a matter of law, easonable. Plaintiff's ADA claim must therefore be dismissed.

The retaliation claim must also fail, if for no other reason than the undisputed fact that plaintiff had been notified of his impending discharge before he complained to the EEOC. On

this record, no rational jury could find that plaintiff was fired for any reason other than his failure to return to work as directed.

Defendant's motion for summary judgment will be granted.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 96-0167

CHRISTOPHER PANGALOS

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA

ORDER

AND NOW, this 15th day of OCTOBER, 1996, it is ORDERED: Upon consideration of the defendant's motion for summary judgment, and plaintiff's response, it is ORDERED:

1) Defendant's motion for summary judgment is GRANTED.

2) This action is DISMISSED WITH PREJUDICE.

s/ John P. Fullam
Sr.J.

APPENDIX C — DENIAL OF PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 29, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-2022

CHRISTOPHER PANGALOS,

Appellant

v.

PRUDENTIAL INSURANCE COMPANY OF AMERICA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 96-00167)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, *Circuit Judges*, and GREENAWAY*, *District Judge*

The petition for rehearing filed by the appellant, Christopher Pangalos, in the above captioned matter having been submitted to the judges who participated in the decision of this court and

* Honorable Joseph A. Greenaway, Jr., Judge of the United States District Court for the District of New Jersey, sitting by designation.

to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Mansmann would grant rehearing by the court en banc.

BY THE COURT:

s/ illegible
Circuit Judge

DATED: JUL 29 1997